

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

HIGH COURT CRIMINAL APPEAL NO. 1221 OF 2001

(From Original Conviction(s) and sentence(s) Criminal case No. 2600 of 2000 of the Snr. Principal magistrate's Court at Kibera)

MELISSA ROGERS MALUMBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

On 19th December, 2001, the court allowed the appellant's appeal but reserved the reasons therefore. The date set has since passed but it is necessary to lay down the said reasons for purposes of record.

It is necessary to mention from the outset that the republic conceded this appeal. The appellant had been charged with one count of making a document without authority C/s 357 of the Penal Code and eight counts of obtaining money by false pretences C/s 313 of the Penal Code. After a full trial, the appellant was convicted of counts 2 3 5 7 8 and 10 and sentenced to twelve months imprisonment on each count. Sentences were ordered to run concurrently.

The particulars of the charges upon which the appellant was convicted were that she obtained money from the several complainants by falsely pretending that she was in a position to get them traveling visas to the United States of America.

It transpired during the trial that, the appellant runs a tour firm. She assists various people to gain entry into the U.S.A. In the instant case the complainants had a common ground that none was promised a visa but that they would be informed to attend interviews.

The appellant would then instruct the applicants on possible questions and answers they would encounter and give out the interviews. Otherwise she was not in the interviewing panel. She would also provide the reasons for proceeding to the U.S.A.

There was evidence that some applicants did indeed secure visas and traveled to the U.S.A. The bottom line then was that, although the appellant made promises, these did not fall under false pretences. The reasons for the failure to secure visas for those who were unsuccessful could not be attributed to the appellant.

There was also no undertaking by the appellant or understanding on the part of the complainants that the appellant would pay for the visas. In fact the purpose of the payments was not clearly stated by the complainants.

The appellant did not deny she received the money. She did. She in fact gave receipts in her own handwriting. That in fact enhanced her credibility because that was not the conduct of a person with intent to defraud.

Without going any further, the conviction was most unsafe and the benefit of doubt ought to have been given to the appellant.

These then are the reasons for allowing the said appeal.

MBOGHOLI MSAGHA

JUDGE

30TH APRIL 2002